EME COURT, U. S.

DEC 6 1968

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 400

WILLIAM J. VERES,

Petitioner,

vs.

STATE OF ARIZONA

Respondent.

RESPONDENT'S ADDITIONAL RESPONSE TO PETITION FOR WRIT OF CERTIORARI

GARY K. NELSON
The Attorney General
of the State of Arizona

WILLIAM E. EUBANK
Chief Assistant Attorney General

159 State Capitol Building
Phoenix, Arizona

Attorneys for Respondent

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Respondent, STATE OF ARIZONA, by and through its Attorney General GARY K. NELSON, pursuant to the request of the Court, makes additional response to the petition for writ of certiorari heretofore filed herein.

QUESTION PRESENTED

Was the federal question presented in the application for writ of certiorari properly raised in the state courts?

ARGUMENT

Petitioner first raised the federal question in a motion before the Arizona Supreme Court to reconsider the denial of a petition for review of a decision of the Arizona Court of Appeals. This motion was denied, as had been the prior petition for review. The issue of whether petitioner's constitutional rights had been violated was neither timely raised nor properly raised before the Arizona Supreme Court. That Court properly denied the motion to reconsider. It may be assumed in the light of the Arizona Supreme Court's decision, *Climate Control, Inc. v. Hill,* 87 Ariz. 201, 349 P.2d 771 (1960), that the constitutional question was not considered. See also, Appendix "B" at page 15 of petitioner's Memorandum (the decision of the Arizona Court of Appeals).

The federal question has never been considered or decided by the Arizona courts. Therefore, the question should not be considered by the federal court. Rule 19 of the Supreme Court Rules, 28 U.S.C.A., provides *inter alia* that a prerequisite to review on certiorari is that the state court has passed on the federal question. *Ellis v. Dixon,* 349 U.S. 458, 99 L.Ed. 1231, 75 S.Ct. 850, reh. den. 350 U.S. 855, 100 L.Ed. 759, 76 S.Ct. 37 (1955); *Michael v. Louisiana,* 350 U.S. 91, 100 L.Ed. 83, 76 S.Ct. 158 (1955); *Bloeth v. State of New York,* 7 L.Ed.2d 780, 82 S.Ct. 661 (1962).

The record fails to reveal that petitioner sought to raise a federal question until such time as he made a motion to reconsider the State Supreme Court's denial of review of the Court of Appeals' decision. The Supreme Court of Arizona did not consider the federal question. It would be improper for this Court to pass

on the federal question, which had not first been considered by the state court.

This application is clearly distinguished from those presented in *Mempa v. Rhay,* 389 U.S. 128, 19 L.Ed.2d 336, 88 S.Ct. 254 (1967) and *McConnell v. Rhay,* ..... U.S. ....., 21 L.Ed.2d 2, 89 S.Ct. 32 (1968), in that the petitioner herein was represented by counsel at his hearing on revocation of probation and sentencing.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

GARY K. NELSON
The Attorney General

WILLIAM E. EUBANK
Chief Assistant Attorney General

AFFIDAVIT

STATE OF ARIZONA }
County of Maricopa } ss.

WILLIAM E. EUBANK, being first duly sworn upon oath, deposes and says:

That pursuant to Rules of the Supreme Court, Rule 33, sub.sec. 3(c), he served the attorneys for the petitioner in the foregoing case by forwarding two (2) exact copies of Respondent's Additional Response to Petition for Writ of Certiorari in a sealed envelope, first-class postage prepaid, and deposited same in the United States mail addressed to:

Phillip Weeks
BURTON & WEEKS
P. O. Box 1486
Scottsdale, Arizona 85252

this.....day of December, 1968.

.....

SUBSCRIBED AND SWORN to before me this.....day of December, 1968.

.....
Notary Public

My commission expires:

.....